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# Balancing “Parents Are” and “Parents Do” in the Supreme Court’s Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood\*

David M. Wagner\*\*

## I. INTRODUCTION

Chapter 2 of the American Law Institute’s (“ALI”) proposed *Principles of the Law of Family Dissolution*<sup>1</sup> proposes to widen considerably two relatively new concepts in family law: “de facto parenthood”<sup>2</sup> and “parenthood by estoppel.”<sup>3</sup> Of course, persons other than biological or adoptive parents have been acting in parental roles

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) § 2.03 [hereinafter PRINCIPLES (Tentative Draft No. 4)].

2. A concept by the name of “de facto parenthood” is given limited recognition in California’s Family Law Act of 1969. See CAL. CIV. CODE § 4600; see also CAL. R. COURT 1401, 1410, 1412. “The term de facto parenthood has its genesis in the juvenile justice system and generally has been used to refer to foster parents caring for dependent children.” *Z.C.W. v. Lisa W.*, 71 Cal. App. 4th 524, 528 (1999). A Florida court rejected a same-sex partner’s claim to de facto parenthood in *Music v. Rachford*, 654 So. 2d 1234 (Fla. Dist. Ct. App. 1995).

3. In 1991, Wisconsin rejected both “de facto parenthood” and the notion of an “‘equitable’ parent”; *In re Interest of Z.J.H.*, 471 N.W.2d 202, 207 (Wis. 1991). But *Z.J.H.* was overruled on this point in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). The Massachusetts Supreme Judicial Court granted visitation to a biological mother’s former same-sex partner, over the biological mother’s objections, invoking both “de facto parenthood” and the “equitable parent doctrine,” *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999). The court specifically cited the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Tentative Draft No. 3, Part I, March 20, 1998) § 2.03. *E.N.O.*, 711 N.E. 2d at 891. In Pennsylvania, a court as early as 1979 used the term “parent by estoppel” where a putative father—later conclusively proved *not* to be the biological father of the child—had failed to file exceptions to a final order of support for a child born to his wife ten years after he and his wife had separated. *Commonwealth ex rel Nixon v. Nixon*, 458 A.2d 976, 978 (Pa. 1983). The court, however, allowed the filing of the exception nunc pro tunc. *Id.* at 982.

toward children for ages; what is new here as in other parts of the ALI *Principles*<sup>4</sup> is the taking of historically nonlegal relationships into the domain of law.

This proposal would recognize and regularize the notion that adults unrelated to a child may establish the legal equivalent of parenthood over that child provided (1) that they have acted in a parental role toward that child and (2) that such conduct was authorized by one of the natural parents. The ALI proposal forces us to think about the nature and origins of parental status. Does parental status begin and end with the biological link, or, on the contrary, is it the case that “parents are as parents do”?

From my perspective as a constitutionalist rather than a family law expert, I would like to examine how the cases in the field of constitutionalized family law balance the sometimes competing claims of nature and nurture in settling contested claims of parental rights, and what conclusions can be drawn from that examination in regard to the ALI proposed expansion of the concept of de facto parenthood.

Section II of this essay will walk us through the case law on parental rights that developed in the context of the fathers’ rights cases of the 1970s and 1980s. Section III attempts to synthesize this case law so as to show its relevance to the question of de facto parenthood. Section IV applies this synthesis to the de facto parenthood concept, and Section V offers some concluding reflections, namely, (1) that expansive notions of de facto parenthood are not required by constitutional case law, which continues to respect both biological parenthood and customary usage, and (2) that such notions risk bringing about what I call parent inflation, devaluing an already too-scarce resource.

## II. CONSTITUTIONAL STANDARDS ESTABLISHED IN THE CONTEXT OF FATHERS’ RIGHTS

When the Supreme Court first held that Fourteenth Amendment Due Process entitled an unwed biological father to a hearing on his parental fitness before custody of his children could be assigned elsewhere following the death of the children’s mother,<sup>5</sup> Chief Justice Burger predicted in dissent that the case would signal “a novel

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4. For example, the ALI cloaks cohabitation with legal consequences. *PRINCIPLES* (Tentative Draft No. 4), *supra* note 1, §§ 6.01–6.05.

5. *Stanley v. Illinois*, 405 U.S. 645 (1972).

concept of the natural law” and that this project would “have strange boundaries as yet undiscernible.”<sup>6</sup> *Stanley* did indeed turn out to be the start of a strange Rhine Journey, but a quarter of a century later, especially in light of the Court’s 1989 holding in *Michael H. v. Gerald D.*,<sup>7</sup> the river carrying us along has not yet overflowed its banks. The Court has affirmed the importance of the biological aspect of parenthood, sometimes, as in *Stanley*, giving it considerable importance. Thus, we can conclude that “parents are,” that is, parenthood is to some extent an identity arising out of biological facts.

But at the same time, the Court has consistently affirmed that parenthood is a social role, such that those who play the role have enhanced status before the law if and when their parenthood is drawn into question. Thus, even in *Stanley*, the majority of the Court pointed to Mr. Stanley’s frequent (though not uninterrupted) efforts to act as father to his children,<sup>8</sup> while the dissenters disputed the evidence for this.<sup>9</sup> Both agreed, however, that the issue was relevant to Mr. Stanley’s claim.<sup>10</sup> Thus, we can conclude that “parents do,” that is, parenthood is to some extent a role defined by legal, social, and traditional expectations, and those who play the role get the status—or *may* get it. The qualifications of this “may” are among the issues raised by the ALI drafts.

In *Quilloin v. Walcott*,<sup>11</sup> the Court found no Due Process violation where the natural father, complaining of lack of opportunity to veto his child’s adoption, had done nothing to exercise or claim parental rights. Biology was not enough. Why not? Set against Mr. Quilloin’s biologically-based claims were the claims of a legal family,

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6. *Id.* at 668 (Burger, C.J., dissenting).

7. 491 U.S. 110 (1989) (in which the Court considered the constitutionality of the irrebuttable “marital presumption”—the presumption that a child born to a married woman and conceived during a time when her husband was neither impotent nor out of the country is conclusively presumed to be a “child of the marriage”—as applied against an adulterous natural father who wished to attain parental rights over his natural daughter over the objections of the girl’s natural mother and legal father. In a plurality opinion, the Court held that this presumption is rationally related to the legitimate state interest in protecting the legitimacy of children and insulating intact families from blast-from-the-past attacks. Invoking a jurisprudence of tradition, it also held that the adulterous natural father could not show that his interest was one that American legal traditions have historically fostered and protected; rather the opposite, in fact).

8. See *Stanley*, 405 U.S. at 650–51, 655.

9. See *id.* at 667 (Burger, C.J., dissenting).

10. See *id.* at 649; *id.* at 662–63 (Burger, C.J., dissenting).

11. 434 U.S. 246 (1978).

into which the child's mother, Ardell Williams, proposed to enter with her marriage to Randall Walcott, and into which she wished to bring her child.<sup>12</sup> As the Court noted at the outset, "the countervailing interests are more substantial"<sup>13</sup> than in *Stanley*. Winding up the analysis for the unanimous Court, Justice Marshall remarked: "[T]he result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant."<sup>14</sup>

Furthermore, Quilloin "did not petition for legitimation of his child at any time during the [eleven] years between the child's birth and the filing of Randall Walcott's adoption petition,"<sup>15</sup> and he "[did] not complain of his exemption from [paternal] responsibilities and, indeed, he does not even now seek custody of his child."<sup>16</sup>

Thus, two rationales were offered by the *Quilloin* Court for its outcome: first, an emerging estoppel doctrine<sup>17</sup> based on the "parents do" approach to parental rights and second, respect for marriage as a legal institution capable of overriding the competing interests of an individual. Justice Marshall's *bon mot* about everyone except appellant being pleased with the adoption should not be taken to mean that the Court resolves these disputes by polling the leading participants. Rather, the Court is indicating that the challenged law did what society expects family law to do: provide a legal framework for stable and predictable family relationships and thereby serve the best interests of the child.<sup>18</sup> The two rationales of *Quilloin*—that the law rightly prefers formal family units, and that Mr. Quilloin had failed to act as we expect parents to act—are complementary: both speak essentially of socio-legal roles and expectations. The *Quilloin* decision suggests rather strongly that in questions of custody, we are dealing with social roles as much as—and perhaps more than—individual rights or claims.

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12. See *id.* at 247.

13. *Id.* at 248.

14. *Id.* at 255.

15. *Id.* at 249.

16. *Id.* at 256.

17. The estoppel doctrine dictates that if a parent does not have a social relationship with the child, then that parent is estopped from interfering with the adoption of the child by the new husband of the mother. This doctrine is based on the belief that respect for the marriage institution outweighs the other interests at stake.

18. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 789 (2d ed. 1988).

Were both of these rationales necessary? Would Mr. Quilloin have won, despite his inactivity as a parent, if Mr. Walcott and Ms. Williams wished to adopt the child without marrying? Or taking the reverse, would Mr. Quilloin have won if he had taken a substantial part in the child’s upbringing, notwithstanding the Walcotts’ marriage?

This latter fact pattern came to the Court one year later in *Caban v. Mohammed*,<sup>19</sup> the only case in this series in which a plaintiff successfully interrupts an adoption. Here, in a 5-4 decision, the Court held that the Equal Protection Clause was violated by a rule that allowed unwed mothers, but not unwed fathers, to veto an adoption without showing that it would be contrary to the best interests of the child (an issue that was not properly presented in *Quilloin*<sup>20</sup>). A simple application of the Equal Protection section of the *Stanley* opinion<sup>21</sup> might have solved the *Caban* case. But the Court also stressed, in two footnotes, another distinction from *Quilloin*: Leon Quilloin, unlike Abdiel Caban, had “fail[ed] to act as a father toward his children,”<sup>22</sup> and “the relationship that in fact exists between parent and child” is important “in cases of this kind.”<sup>23</sup>

This welcome affirmation of the importance of actually-existing relationships came at some cost in that it devalued what Justice Stewart in dissent called the father’s “legal tie”<sup>24</sup> with the mother. Justice Stewart sees this primarily in terms of denying a child the “benefit of legitimacy,” a benefit that the majority opinion allows unwed fathers to withhold from their children, at least where an effective father-child relationship exists.<sup>25</sup> One might add that the benefits lost by children under the *Caban* holding are not only le-

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19. 441 U.S. 380 (1979).

20. The principal equal protection issue in *Quilloin* concerned the disparate treatment of married and unmarried fathers. The Court said simply: “We think appellant’s interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father.” *Id.* at 256. The issue of whether equal protection demands equal treatment of unwed fathers and unwed mothers, later squarely presented in *Caban*, was only alluded to in the last paragraph of appellant’s brief in *Quilloin*. See *Quilloin*, 434 U.S. at 253 n.13.

21. “[D]enying such a hearing [on parental fitness] to Stanley and those like him [i.e. unmarried fathers] while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.” 405 U.S. at 658.

22. *Caban*, 441 U.S. at 389 n.7.

23. *Id.* at 393 n.14.

24. *Id.* at 397 (Stewart, J., dissenting).

25. *Id.*

gitimacy (a decreasingly significant benefit in modern society anyway), but also the stability and predictability that children need and that are furthered by legal formality.<sup>26</sup>

As Justice Stewart also notes, the majority in *Caban* requires adoption to pass a double obstacle course: ratification by *both* parents, not just one, at least where both parents have had a parental relationship with the child.<sup>27</sup> For Justice Stewart, this holding is a regrettable deterrent to adoptions, but, for the time being, such are the demands of Equal Protection. Significantly, portions of Justice Stewart's dissent were adopted as part of the opinion of the Court in *Lehr v. Robertson*.<sup>28</sup> *Lehr* may be said to form a bridge between *Caban* and *Michael H.* Jonathan Lehr, having begotten Jessica M. out of wedlock, sought to block the adoption of Jessica by her mother, Lorraine, and Lorraine's new husband, Richard Robertson. Mr. Lehr had not, however, formed a paternal relationship with Jessica. Thus, *Lehr* may be said to be *Caban* without the actually-existing relationship between the plaintiff-father and the child. *Lehr* is also *Michael H.* without the actually-existing marriage at the time the child was conceived and born. The result is in contrast with *Caban* and in line with *Michael H.*—that is, the unwed father loses—suggesting that *Quilloin*, *Lehr*, and *Michael H.* are the lead cases, and *Caban* the outlier.

### III. DEFINING CONSTITUTIONAL STANDARDS

What does this tell us about the issue of “parents are” versus “parents do,” or nature versus nurture? First, within that dichotomy, the Court placed more stress on “parents do,” or nurture. Thus, Abdiel Caban won because he had acted as a social and effective father,

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26. These benefits are also discussed by Justice Stevens in a separate dissent:

[A] rule that gives the mother of the newborn infant the exclusive right to consent to its adoption . . . gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how best to care for the child. It also gives the loving father an incentive to marry the mother, and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible.

*Id.* at 407–08 (Stevens, J., dissenting). Obviously, Justice Stevens's view will be less compelling the less one views the father marrying the mother as a *prima facie* benefit to the child.

27. *Id.* at 395 (Stewart, J., dissenting).

28. 463 U.S. 248 (1983).

not just as a biological father, to his child, while Leon Quilloin and Jonathan Lehr lost because they did not. Paul Stanley won partly because he was the biological father, but also because he had a paternal relationship with the children. The social rather than the biological aspect of parenting seems to be the determining factor. Thus, all lights seem to be green for the ALI project of expanding de facto parenthood.

But we have not yet accounted for *Michael H.* In this case—made famous by its footnote six<sup>29</sup> and by its coruscating by-play between Justices Scalia and Brennan<sup>30</sup>—a plaintiff-father situated very similarly to Abdiel Caban nonetheless loses. Why? Because in *Michael H.*, unlike *Caban*, “an extant marital unit that wishe[d] to embrace the child”<sup>31</sup> existed at the time she was conceived; this fact triggered the marital presumption rule,<sup>32</sup> which was the actual focus of the litigation. At the end of the day, the Court held that a marriage that is both formal (a marriage recognized as such by law) and effective (its participants desire to maintain it and to keep within it “the child they acknowledge to be theirs”<sup>33</sup>) prevails even over an unwed father who has had a paternal relationship with the child.

Why is this outcome significant? In *Lehr*, the Court adopted por-

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29. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6. This footnote, written by Justice Scalia and joined only by Chief Justice Rehnquist, suggests a methodology for reconciling the substantive due process cases that trace their lineage to *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), with the demands of judicial restraint. In a nutshell, this methodology consists of articulating new constitutional rights-claims at “the most specific level [of generality] at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Michael H.*, 491 U.S. at 127 n.6. Any other method, Justice Scalia argues, including that of leaving it up to the Court to decide the appropriate “level of generality” at which to articulate a rights-claim, would “permit judges to dictate rather than discern the society’s views.” *Id.*

30. 491 U.S. at 123 n.2, 124 n.4, 126 n.5, 127 n.6, 129 n.7 & 130; *see also id.* at 137, 156 (Brennan, J., dissenting).

31. *Michael H.*, 491 U.S. at 127.

32. The “marital presumption” is the common-law rule that a child born to a married woman, assuming her husband was neither impotent nor out of the country at the time of conception, is conclusively (or, in some jurisdictions, rebuttably) presumed to be legitimate. *See Michael H.*, 491 U.S. at 117. The purpose of this “fundamental principle of common law,” *id.* at 124, is to protect children’s legitimacy by relieving them of the need to prove it except in unusual cases. *See id.* at 125 (common law had “an aversion to declaring children illegitimate”). As Justice Scalia explains in *Michael H.*, citing a five hundred year span of common law authorities, *id.* at 124–25, the rule also preserves family stability by “excluding inquiries into the child’s paternity that would be destructive of family integrity and privacy.” *Id.* at 120.

33. *Id.* at 124.



tions of Justice Stewart's *Caban* dissent to the effect that a "legal tie" between the parents may limit "whatever substantive constitutional claims might otherwise exist"<sup>34</sup> on the part of outsiders to that legal tie, even if that outsider is a biological father enjoying an "actual relationship with the children."<sup>35</sup> Justice Stewart's "legal tie" dictum was further adopted by the plurality in *Michael H.*<sup>36</sup> in support of a theme that runs throughout that opinion: the tradition of our family law favors the creation and maintenance of a formal, legal entity (one may call it the "unitary family"); the family law tradition further favors the immunizing of this entity against legal attack (hence the legitimacy presumption at issue in *Michael H.*) and makes this entity, in an important sense, exclusive. Access to the entity for an outsider is decidedly the exception and not the rule.

Thus, the combined teaching of *Caban*, *Lehr*, and *Michael H.* seems to be that the unwed biological father has constitutionally-protected parental rights if, but only if, he has established a paternal relationship with the child *and* no marital unit exists with which such rights would conflict. Thus, to the dichotomy of "parents are" and "parents do" or nature and nurture, *Lehr* and *Michael H.* add a third term, which may be called "formality" or "legality."

Legality and tradition are not unrelated phenomena. But here, clashing jurisprudential philosophies beckon.<sup>37</sup> I will make a merely Burkean claim,<sup>38</sup> perhaps filtered through Alasdair MacIntyre:<sup>39</sup> laws

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34. *Lehr*, 463 U.S. 262 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (Stewart, J., dissenting)).

35. *Id.*

36. 491 U.S. at 128-29.

37. For instance, one may be an Austinian positivist, see generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (photo. reprint 1984) (1832), in which case one would most likely believe that the backing of tradition may make the masses feel better about a law but will not even remotely affect the law's validity. Or one may be a natural law theorist—and then debate whether natural law privileges marriage as traditionally understood, as argued in John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97 (1997) and in Robert P. George & Gerard Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995), or whether it privileges moral innovation and/or self-fulfillment, as argued in KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION* (1993) and in David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986).

38. See generally EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (photo. reprint 1993) (1790).

39. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1984); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988); David Wagner, *Alasdair MacIntyre: Recovering the Rationality of Traditions*, in *LIBERALISM AT THE*

that lack roots in the established practices of a community can be effective, if at all, only through force. On the contrary, laws that reflect and protect the customs of a community are conducive to civic peace. To be sure, such laws run the risk of ossifying ancient errors under color of “tradition.” But this harm—and it is one—is balanced by the fact that civic peace conduces to trust among citizens, which is a pre-condition for consensual change in the law. (Trust among citizens can, of course, be dispensed with where legal change is to be brought about by violent revolution or by judicial activism.)

#### IV. APPLYING CONSTITUTIONAL STANDARDS TO DE FACTO PARENTING

What does this have to do with whether state laws should broaden the category of de facto parenthood in post-divorce custody conflicts? After all, *ex hypothesi*, no extant marital unit<sup>40</sup> exists to provide a *Michael H.*-type “extant family” with which the claims of a de facto parent could conflict. Furthermore, if legality and legal recognition are our concern, then surely legal recognition of such rights is the solution, not the problem.

There are two problems with this point of view. One is that the ALI drafts contemplate the recognition of de facto parenthood on the part of persons who have engaged in parent-like activities toward the child, provided those activities took place with the consent of one—not both!—of the natural parents.<sup>41</sup> There is at least some tension between this rule and the holding in *Caban*: that when both parents have established a parental relationship with the child, both parents must sign off on an adoption, i.e., on any legal recognition of parental rights in persons who have not hitherto possessed them in regard to the child in question.

*Caban* to one side, I can see arguments both for and against the one-parent rule for creating the precursor facts for de facto parent-

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CROSSROADS 97 (C. Wolfe & J. Hittinger eds. 1994).

40. See *supra* note 31 and accompanying text.

41. A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and *with the agreement of a legal parent* to form a parent-child relationship. . . . (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 2.03 (second emphasis added).

hood. In favor of it is the argument made by Justice Stewart in his *Caban* dissent regarding adoption,<sup>42</sup> applied by analogy to de facto parenthood: to give both parents a veto power over adoption will impede the adoption process, promote tactical obstruction by a parent holding out for something else, and so forth. If de facto parenthood is beneficial to children, then requiring bi-parental consent for its creation—or, more accurately, for the precursor facts for its creation—is undesirable.

But this only brings me to my second problem with de facto parenthood legislation. De facto parenthood is not necessarily as beneficial to children as adoption. It does not, for instance, guarantee the child a home—only a relationship. This may make de facto parenthood congenial to an era that values relationships but tends to denigrate the concept of the home: after all, relationships are fluid and expressive, whereas homes tend to be solid, silent, and stationary.<sup>43</sup> It is true, of course, that children whose natural parents have divorced benefit greatly from parent-like relationships with other adults; the inevitable pain of parental divorce is greatly lessened for many children by teachers, coaches, and other mentors who take up some of the slack left by divorcing parents. But these heroes do not need legal status to do what they are doing.

What then does de facto parenthood contribute? It is not the equivalent of adoption; it is not necessary for a mentoring relationship; it does, however, sow uncertainty and fluidity about the meaning of parenthood.

Consequently, the specter of “parent inflation” must be considered. We know what happens when governments print money without restraint: the result is not more wealth, but less, as each unit of money declines in value. Parent-child relationships, of course, are not currency, but they have at least this much in common with it: they are valuable at least in part because of their protected legal status. When the government prints “This note is legal tender for all debts,

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42. See *supra* note 27 and accompanying text.

43. There is now an extensive literature seeking to rehabilitate the concepts of home and family from attacks rooted in expressive individualism. See, e.g., BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1996) (esp. ch. 3); MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE* (1996); MAGGIE GALLAGHER, *ENEMIES OF EROS* (1989); MAGGIE GALLAGHER & LINDA WAITE, *THE CASE FOR MARRIAGE* (2000); CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* (1979); CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED* (photo. reprint 1995) (1977); DANA MACK, *THE ASSAULT ON PARENTHOOD: HOW OUR CULTURE UNDERMINES THE FAMILY* (1997).

public and private” on a bill, it is giving that bill a special status vis-à-vis other pieces of paper. It can extend that status to more and more pieces of paper, but the only effect of such “de facto currency” will be to make all currency less valuable.

Not that such experiments would be unconstitutional. As the plurality in *Michael H.* stressed, it was the state legislature in that case, not the Court, that made the value judgment that the Court upheld. There may be a *Meyer-Pierce*-based argument to be made against de facto parenthood,<sup>44</sup> but it would take considerable judicial activism for the Court to buy such an argument. If judicial activism is to be avoided, as I think it should be, the Court’s family law cases from *Meyer* to *Michael H.* cannot be read to create a constitutional obstacle to de facto parenthood.

But if they do not prohibit it, neither do they encourage it. The doctrine of these cases, and of *Michael H.* in particular, is that the dichotomy of “parents are” and “parents do,” of biology and sociality, or nature and nurture, is inadequate. Biology and sociality, or nature and nurture, are both important in the creation and maintenance of families, but a further step must be taken, namely, the “legal tie” of which Justice Stewart spoke<sup>45</sup> and the formality implied in his concept of the “formal family.”

It is not enough to say that states will change their laws in light of the ALI recommendations, thus providing the needed formality. My argument is that of the three—nature, nurture, and formality—none of the three is dispensable. The ALI would ground the new formality of de facto parenthood in the nurture provided by the de facto parent, but the link to the natural or biological family is slender; the ALI proposal requires the consent of only one natural parent, and the consent is *not* to the de facto parental relationship itself. Rather, the consent is only to the precursor facts that the would-be

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44. The argument might go: *Meyer*, *Pierce*, and their progeny stand for the preferred position of the family and of parent-child relationships in our constitutional order, as those concepts were understood at the time these decisions were rendered, or else at the time the Fourteenth Amendment, which these decisions construe, was drafted. An attempt by government to undermine this institution by “parental inflation” may well violate the long-recognized rights of parents, much as government action that destroys the value of an individual’s material holdings may be unconstitutional as a “taking” under the Fifth Amendment. But, as noted in the text, this argument would require of the Court a legislative role that it has often repudiated, not least in *Michael H.* itself.

45. See *supra* notes 24–26 and accompanying text.

de facto parent may later use in their petition for that status from a court.<sup>46</sup>

## V. CONCLUSION

I respectfully suggest that the impulse toward de facto parenthood is driven at least in part by the perception that what children need are *relationships* with adults, rather than the social and legal institutions that have an historical track record in *fostering* relationships. The thinking seems to be this: take the best mentoring relationships you can think of, add legal recognition, and, as my five-year-old daughter likes to say, “hocus-pocus-ala-kazamm-VOILÀ!” But, without taking anything away from what mentoring relationships can do for children, what children really need are homes—that is, one or preferably two natural or adoptive parents, plus a ceiling and four walls, and some hope of stability and duration.

De facto parenthood, and the “parent inflation” that it represents, contradicts the need to preserve the parental relationship as a special and uniquely valuable one. Instead, it contributes to the individual life projects of the adults who wish to achieve de facto parental status. It is, so to speak, “about” the grown-ups, and not “about” the children.

In conclusion, good family law is not infinitely plastic. Certain realities exist that our laws can reflect or fight with, but not ignore. As social critic Maggie Gallagher has argued:

We did not, in the first place, create the erotic drama that marriage embodies. We do not make Eros, it makes us, and the world. . . . Children are the great sign of Eros, who make nonsense of contract because they make nonsense of everything, because they make no sense at all. If greed or reason ruled the world instead of Eros, there would be no children.<sup>47</sup>

Of course, much of present-day theorizing about family and sexual relationships assumes that we did, in fact, create the erotic drama of childbearing to which Gallagher refers.<sup>48</sup> If we created it, we can manipulate it. This is not the occasion to go to the fundamentals of

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46. PRINCIPLES (Tentative Draft No. 4), *supra* note 1.

47. MAGGIE GALLAGHER, ENEMIES OF EROS 209–10 (1989).

48. See, e.g., TAMSIN SPARGO, FOUCAULT AND QUEER THEORY 11–13 (1999).

this argument.<sup>49</sup> I would maintain, though, that if the twenty-first century witnesses tinkering with the fundamentals of human relationships the way the twentieth witnessed tinkering with the fundamentals of economic relationships, it will be another century of state-sponsored chaos and disaster.

Just as, in Gallagher’s argument, marriage is too great and mysterious to be contained by contract law, so parenthood is too great and mysterious to be within the gift of legislators or law reformers, however well-intentioned. Revelation to one side, only the composite common sense of the generations—sometimes called tradition—can come up with a system of parental law. A priori system-makers will be ineffective at best, and destructive at worst.

American law should adhere to the known and existing means of creating the parental relationship. Parents do, of course, need help in rearing their children—help from family, friends, voluntary associations, and, in extreme cases, government agencies—and the more straitened the circumstances of a particular parent, the more such help that parent will need. But the sources of that help should be honored under their familiar names, as for instance when Alasdair MacIntyre writes:

Neither the state nor the family then is the form of association whose common good is to be both served and sustained by the virtues of acknowledged dependence. It must instead be some form of local community with which the activities of families, workplaces, schools, clinics, clubs dedicated to debate and clubs dedicated to games and sports, and religious congregations may all find a place.<sup>50</sup>

Uncles, aunts, bosses, colleagues, teachers, doctors, nurses, debating partners, coaches, teammates, clergymen, and others that did not make MacIntyre’s list, always have and always will help parents, sometimes to a heroic degree. But opening up an easy way for them to attain the name and legal status of “parent” over their nieces, nephews, students, patients, team members, congregants, etc., will only devalue that name and that legal status, while doing nothing for the children that is not already being done.

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49. *But see supra* notes 32 and 37.

50. ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* 135 (1999).

